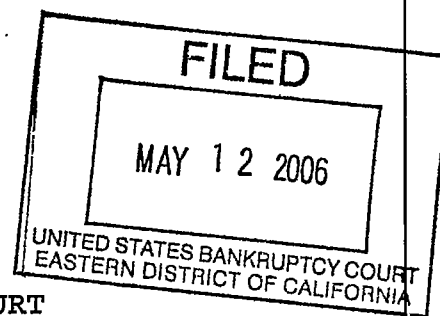


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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:)	Case No. 05-26408-C-7
)	
RYAN C. CHURCHILL,)	Adversary No. 05-2313
)	
)	DC No. BRR-2
Debtor(s).)	
)	
MARCO AMBROSELLI,)	
)	
Plaintiff(s),)	
)	
v.)	
)	
RYAN C. CHURCHILL,)	
)	
Defendant(s).)	

MEMORANDUM DECISION ON MOTION TO DISMISS ADVERSARY PROCEEDING

This court conducted an evidentiary hearing on May 10, 2006, on the question whether the summons and complaint were personally served on the defendant on August 29, 2005, as alleged by the plaintiff Marco Ambroselli in the return of service. Findings of fact and conclusions of law were rendered on the record in which the court concluded, based on its resolution of the credibility of the testimony of the various witnesses, that the summons and complaint were not personally served on August 29, 2005, and that the declaration in support thereof accordingly was false.

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1 The motion before the court included a motion to dismiss for
2 failure to have served the summons and complaint within the time
3 specified by Federal Rule of Civil Procedure 4(m), as
4 incorporated by Federal Rule of Bankruptcy Procedure 7004(a).
5 The parties argued their respective positions after the court
6 resolved the service question, and the matter was taken under
7 submission so that the court could conduct further appropriate
8 legal research and reflect upon the appropriate outcome.

9 Upon reflection, the court is persuaded that the appropriate
10 resolution of this matter is to dismiss the adversary proceeding
11 without prejudice pursuant to Rule 4(m).

12 This is a situation in which the process server, Charles
13 Segerman, who is not a registered process server in California
14 (and whose testimony the court did not believe), is so closely
15 aligned with the plaintiff by way of personal association that it
16 is appropriate to charge the plaintiff with knowledge of, and
17 responsibility for, the false affidavit regarding personal
18 service.

19 The Rule regarding the time limitation for service of
20 process is Rule 4(m), which permits dismissal of an action
21 without prejudice with respect to a defendant as to whom service
22 of the summons and complaint is not made within 120 days after
23 the filing of the complaint. The 120th day after August 29,
24 2005, was December 27, 2005. The court also has discretion to
25 direct that service be within a specified time and, where there
26 is a demonstration of good cause for failure of service, an
27 extension becomes mandatory.

28 The meaning of "good cause" under Rule 4(m) is the same as

1 the meaning of that term in the predecessor version of the Rule,
2 Federal Rule of Civil Procedure 4(j). This court reviewed the
3 Ninth Circuit decisions on that point in its decision in Stinnett
4 v. Wilson (In re Wilson), 96 B.R. 301, 303-04 (Bankr. E.D. Cal.
5 1989). In the Ninth Circuit, misdeeds of employees of counsel,
6 mistaken assumptions, inadvertence of counsel, secretarial
7 oversight, or ignorance of the terms of the relevant rule of
8 procedure do not demonstrate "good cause" excusing timely
9 service. Townsel v. County of Contra Costa, 820 F.2d 319 (9th
10 Cir. 1987); Hart v. United States, 817 F.2d 78 (9th Cir. 1987);
11 Whale v. United States, 792 F.2d 951 (9th Cir. 1986); Wei v.
12 Hawaii, 763 F.2d 370 (9th Cir. 1985).

13 Moreover, the provisions that a dismissal without prejudice
14 might actually constitute a dismissal with prejudice in light of
15 an intervening time bar does not affect the "good cause"
16 analysis. Townsel, 820 F.2d at 320; Hart, 817 F.2d at 81; United
17 States v. Kenner Gen. Contractors, 764 F.2d 707, 711 n.5 (9th
18 Cir. 1985).

19 The court is persuaded that the false affidavit by the
20 process server, who was personally selected by the plaintiff
21 because of his association with the plaintiff, is such that there
22 is not "good cause" for extending the time in which to serve the
23 summons and complaint. In other words, extension of the time for
24 service for an appropriate period is not mandated by Rule 4(m).

25 The question then becomes whether the court should exercise
26 its discretion to direct that service be effected within a
27 specified time or instead to dismiss the action. As Professors
28 Wright and Miller note, the analysis is equitable in nature. See

1 4B Charles Alan Wright & Arthur R. Miller, Federal Practice &
2 Procedure, § 1137 (3d ed. 2002).

3 Under the equities of the case, taking into account all of
4 the testimony that was presented at the evidentiary hearing on
5 the service question, the court is persuaded that the appropriate
6 course is to exercise its discretion to dismiss the adversary
7 proceeding without prejudice. In so doing, the court is mindful
8 that, if the adversary proceeding is re-filed, a defense of a
9 limitations period may be interposed and that an argument in
10 favor of equitable tolling may be presented. This decision does
11 not constitute a determination, one way or the other, on how the
12 court would rule on such a matter.

13 For the foregoing reasons, the adversary proceeding will be
14 dismissed without prejudice. An appropriate order will issue.

15 Dated: May 12, 2006.

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18 _____
19 UNITED STATES BANKRUPTCY JUDGE
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CERTIFICATE OF SERVICE

On the date indicated below, I served a true and correct copy(ies) of the attached document by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed and by depositing said envelope in the United States mail or by placing said copy(ies) into an interoffice delivery receptacle located in the Clerk's Office.

Lyle D. Solomon
PO Box 1411
Rocklin, CA 95677

Bret R. Rossi
2214 U St
Sacramento, CA 95818

Dated:

5/12/06


DEPUTY CLERK